A

HONG LEONG BANK BHD

v.

DATO' TAN KIM LEONG

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-866-2001]
16 DECEMBER 2005

C ***CIVIL PROCEDURE:*** *Summary judgment - Triable issue - Banking facility - Claim for monies owed - Certificate of Indebtedness, absence of - Whether fatal - Whether matter to proceed to close of pleadings - Rules of High Court 1980, O. 14*

This was an appeal against the decision of the learned senior assistant D registrar granting summary judgment to the plaintiff bank in respect of its claim of RM1,363,514.31 and RM548,089.93 respectively. The facts showed that summary judgment was granted notwithstanding the defendant's denial as to liability, and notwithstanding that no Certificate of Indebtedness had been produced by the plaintiff in its affidavit in E support asserting the quantum owed. At the hearing, the only question that arose was whether the registrar's decision on the facts and in the circumstances could not be sustained.

Held (allowing the appeal):

F **(1)** The view that the summary judgment procedure under O. 14 is a quick route to judgment is only true where there is no dispute. It is erroneous to continue to pursue it, when it is disputed, through hearing before the registrar, appeal to judge in chambers and further. The reality is, where there is any dispute, the matter should proceed G to close of proceeding and preparation for trial. (para 12)

(2) In this case, the facility agreement and the notices and letters of demand produced in the plaintiff's affidavit in support provided evidence of the basis of the claim. However, there is no evidence as to the quantum which is often sought to be proved by an H appropriate Certificate of Indebtedness if the agreement provides that such a certificate shall be final and conclusive evidence. (para 13)

(3) Since there is no Certificate of Indebtedness produced in this case, it is unnecessary to proceed to a detailed consideration of the I authorities submitted by the parties. It, therefore, remains that the assertions of quantum in the affidavit in support and reply were disputed. Although the dispute appears as a denial, the denial is of a nature that can easily and decisively be disposed off in preparation

for trial by further particulars, discoveries and interrogatories available in the writ procedure. Without an appropriate and conclusive Certificate of Indebtedness, the application for summary judgment must necessarily fail. (para 13)

Case(s) referred to:
Abdul Mulok Awang Damit v. Perdana Industries Holding Bhd [2003] 3 CLJ 497 CA ***(refd)***
Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627 SC; [1992] 1 CLJ (Rep) 14 SC ***(refd)***
Chen Heng Png & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
OCBC Bank Bhd v. Sin Lee Meng Farm SB [2002] 7 CLJ 433 HC ***(refd)***
Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***
Societe Des Etains De Bayas Tudjuh [1978] 2 MLJ 267 ***(refd)***
Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4CLJ 617 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff - Ashmadi Othman; M/s Che Mokhtar & Ling
For the defendant - Chetan Jethwani; M/s Sri Ram & Co

Reported by Rose Aziz

JUDGMENT

Abdul Wahab Patail J:

[1] On 13 December 2001 the defendant, Dato' Tan Kim Leong has appealed from the decision of the learned senior assistant registrar made on 10 December 2001 to allow an application to enter summary judgment under O. 14 of the Rules of the High Court 1980 against him. After a number of appearances before previous judges, the appeal was fixed before me on 1 November 2004 where the appeal was allowed with costs.

[2] The plaintiff had filed a writ on 21 May 2001 claiming the payment of RM1,363,514.31 with interest at 2.25% above base lending rate from 5 April 2001 until full settlement and RM548,089.93 with interest at 3.5% above base lending rate similarly. Appearance was filed on 21 June 2001 and a summons in chambers for summary judgment with a supporting affidavit Tan Wai Sang, the branch manager of the plaintiff bank was filed on 2 July 2001.

[3] The defendant had averred in his affidavit in opposition to summary judgment that he denied liability for the sums claimed by the plaintiff or any sum whatsoever, and additionally averred that he had representations by representatives of the plaintiff that the rate of interest would be maintained at 2% above base lending rate which the plaintiff had breached.

[4] It is clear from the affidavit in reply of Tan Wai Sang that the statements in the affidavit of the defendant affirmed on 17 August 2001 were disputed.

[5] The only issue before the court in an application under O. 14 of the Rules of the High Court is whether there are triable issues.

[6] The plaintiff's claim is based solely upon a written agreement. The alleged representation if true, would have been made after the agreement. There is nothing in law that prevents an agreement from being varied subsequently by agreement. When denied by the plaintiff, it becomes an issue of whether in fact there was that subsequent agreement.

[7] The defendant had denied that any sum was due or owing. The denial appears as a bare denial, with the additional assertion of a further agreement. Bare denial is the hallmark of abuse by a defendant with no *bona fide* defence who seeks to delay the day of accounting by demanding a trial. Hence it was held in *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617 HC that the question in an O. 14 application is whether the defendant has a real or *bona fide* defence. It has been held in *Abdul Mulok Awang Damit v. Perdana Industries Holding Bhd* [2003] 3 CLJ 497 CA that bare assertions of representations giving assurances do not add up to a triable issue requiring a full trial. But notwithstanding extensive arguments in submissions, both counsels have not relied upon this case. In *OCBC Bank Bhd v. Sin Lee Meng Farm SB* [2002] 7 CLJ 433 HC it was held that raising all and sundry matters as purported issues regardless of veracity shows lack of *bona fide* and is an abuse of process.

[8] In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC a the decision of the then Supreme Court, Mohamed Azmi SCJ, writing for the majority succinctly explained the nature of a triable issue as follows:

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our

> opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[9] Lord Diplock in his speech in the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212, said:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[10] In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 CA Mahadev Shankar JCA, writing the judgment for the Court of Appeal, held that denials in a defence do not constitute evidence but are challenges to the other party to show proof. In other words, a denial cannot warrant the summary dismissal of the defendant's case without inquiring into the evidence to determine its substance or lack thereof and each case must necessarily depend upon their particular facts.

[11] It must also be borne in mind O. 14 is to be filed after appearance has been entered but before a defence has been filed. In *Societe Des Etains De Bayas Tudjuh* [1978] 2 MLJ 267 Abdoocader J, explaining that an application under O. 14 should be made before defence is filed, held that if it is filed later, the applicant must explain the delay. Otherwise it could not be entertained. It is clear then that an O. 14 application is based only upon the affidavits in support, opposition and reply if any. It does not consider the defence as no defence would yet have been filed. If a defence had been filed, the parties should proceed to trial, unless the court accepts the reason for delay and allows the summary judgment application to be heard. Hence where such a step is warranted, delay is not an objection: *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 CA If no defence had yet been filed, the consideration based upon the affidavits must be confined per O. 14 to a finding whether the plaintiff's case is so clear that the court agrees the defendant has no defence to the claim or any part thereof, or no defence except as to damages. The O. 14 summary judgment is not intended to deny a defendant an opportunity to defend even though his case is weak, as a short cut to a judgment

where there is a dispute. Convenience at the risk of injustice is unacceptable. The summary procedure of O. 14 is intended only to dispose of those cases without proceeding to trial where there is no dispute to the whole or that part of the case for which summary judgment is sought in respect of liability and or quantum.

[12] The view that the summary judgment procedure under O. 14 is a quick route to judgment is only true where there is no dispute. It is erroneous to continue to pursue it, when it is disputed, through hearing before the registrar, appeal to judge in chambers and further. The reality is where there is any dispute, the matter should proceed to close of pleadings and preparation to trial, where the process of verification of evidence in relation to disputed facts through particularisation, discovery and interrogatories, and case management would bring the action to a hearing, a trial if necessary, and to decision far more expeditiously and economically. That process would quickly establish convincingly through verification of any evidence relied on whether the defences raised are *bona fide* and contain substance or otherwise.

[13] The facility agreement and the notices and letters of demand dated 2 March 2001 and 5 April 2001 produced in the affidavit in support provided evidence of basis of the claim. There is no evidence as to the quantum which is often sought to be proved by an appropriate certificate of indebtedness if the agreement provides that such a certificate shall be final and conclusive evidence. Since there is no certificate of indebtedness produced in this case, it is unnecessary to proceed to a detailed consideration of the authorities submitted by the parties. It, therefore, remains that the assertions of quantum in the affidavit in support and reply were disputed. Although the dispute appears as a denial, the denial is of a nature that can easily and decisively be disposed off in preparation for trial by further particulars, discovery and interrogatories available in the writ procedure. Without an appropriate and conclusive certificate of indebtedness, the application for summary judgment must necessarily fail.

[14] For these reasons the appeal was allowed with costs.